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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 170.

JAMES HOOPER, PLAINTIFF IN ERROR,

vs.

DOUGLASS ROBINSON AND JAMES F. COX, AS ROBINSON & COX.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF ~~COLUMBIA~~ Maryland.

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1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit, in and for the district of Maryland, begun and held at the United States court-house, in the city of Baltimore, on the first Monday in April (being the fifth day of the same month) in the year of our Lord one thousand eight hundred and seventy-five.

Present, the honorable William F. Giles, judge Maryland district; Archibald Sterling, jr., esquire, attorney; Edward Y. Goldsborough, esquire, marshal.

JAMES W. CHEW, *Clerk.*

Among other were the following proceedings, to wit:

DOUGLAS ROBINSON & JAMES F. COX
vs.
JAMES HOOPER.

Be it remembered that heretofore, to wit, on the 30th day of October, in the year of our Lord 1873, the said Douglas Robinson and James F. Cox, trading under the name and firm of Robinson & Cox, by Mess'rs Brown & Brune, their attorneys, prosecuted and sued forth out of the circuit court here the writ of the United States of America of
2 summons directed to the marshal of the district aforesaid, in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

The President of the United States to the marshal for the Maryland district, greeting:

We command you that you *to* summon James Hooper, a citizen of the State of Maryland, trading under the firm-name of James Hooper and Company, if he be found in your district, to appear before the judge of the circuit court of the United States of America for the district of Maryland, at the United States court-room, in the city of Baltimore, on the 1st Monday of November next, to answer unto the action of Douglas Robinson and James F. Cox, trading under the firm-name of Robinson & Cox, citizens of the State of New York, and how you shall execute this precept you make known to us in our circuit court for the district aforesaid, and have you then and there this writ.

Witness the honorable Nathan Clifford, associate judge of our Supreme Court, this 2nd Monday of October, in the year of our Lord one thousand eight hundred and seventy-three.

Issued the 30th day of October, 1873.

JAMES W. CHEW,
Clerk District Court.

3 And the said Robinson & Cox, by their said attorneys, on the day of prosecuting and sueing forth the foregoing writ, declared against the said James Hooper, in the plea aforesaid, in form following, to wit:

In the circuit court of the United States for the fourth circuit, in and for the district of Maryland, to wit:

Douglas Robinson and James F. Cox, copartners, trading under the

firm-name of Robinson & Cox, citizens of the State of New York, attorneys and trustees, by Brown & Brune, their attorneys, sue James Hooper, a citizen of the State of Maryland, trading under the firm-name of James Hooper & Company, for money payable by the defendant to the plaintiffs.

1. For money, to wit, the sum of eight thousand dollars in gold, paid by the plaintiffs to the defendant, at his request.

2. And for money, to wit, the sum of eight thousand dollars in gold, received by the defendant for the use of the plaintiffs.

3. And for money, to wit, the sum of eight thousand dollars in gold, found to be due from the defendant to the plaintiffs on accounts stated between them.

4 4. And for that the defendant, by a paper writing signed by him, in the name of his said firm, dated Baltimore, February 10th, 1873, for and in consideration of the sum of eight thousand dollars in gold, the receipt whereof is thereby acknowledged, did assign, transfer, cede, and abandon to the said plaintiff, as attorneys and in trust for the persons issuing the policy of insurance hereinafter mentioned, all the right, title, and interest of him, the said defendant, in and to the amount, to wit, the sum of eight thousand dollars in gold, paid by defendant, being advances for disbursements and repairs on the steamer Carolina, bound from Baltimore to Queenstown, for orders, &c., and covered by insurance at the United States Lloyds, under the attorneyship of Robinson & Cox, the plaintiffs, by policy number 22706, dated October 26th, 1872. Nevertheless, the said defendant, notwithstanding the said assignment to the plaintiffs, collected and received from the owner of the said steamer Carolina the amount of the said advances, to wit, the sum of eight thousand dollars in gold, and refuses to pay the same to the plaintiffs, although it has been frequently demanded by them.

5. And for that certain persons, members of an association known as the "United States Lloyds," the plaintiffs being their attorneys, by a policy of insurance, number 22706, dated October 26th, 1872,

5 insured the defendant, by the name of his said firm, for advances made by him to the amount of eight thousand dollars in gold for disbursements and repairs on the steamer Carolina, bound from Baltimore to Queenstown for orders, &c., on which voyage the said steamer was totally lost, whereupon the said United States Lloyds became liable by virtue of said policy to the defendant for the said sum of eight thousand dollars in gold, as and for a total loss, and the said United States Lloyds then paid to defendant the said sum of eight thousand dollars in gold in compensation and satisfaction of said total loss, and for and in consideration of said payment the defendant by a paper writing, signed by him in the name of his said firm, dated Baltimore February 10th, 1873, did assign, transfer, cede, and abandon to the said plaintiffs, as attorneys, and in trust for the persons issuing said policy, all the right, title, and interest of him, the said defendant, trading as aforesaid, in and to said sum of eight thousand dollars in gold, due and owing by the owner of said steamer to the said defendant, nevertheless the said defendant, notwithstanding the said assignment to the plaintiffs, collected and received from the owner of said steamer Carolina the amount of said advances, to wit, the sum of eight thousand dollars in gold, and refused to pay the same to the

6 plaintiffs, although it has been frequently demanded by them.

And the plaintiffs claim twelve thousand dollars in gold.

BROWN & BRUNE,
Attorneys for Plaintiffs.

A copy of which said declaration was made and sent with the said writ to the marshal of the district aforesaid, thereon endorsed "To be served on the defendant with the writ."

At which mentioned first Monday in November, in the year (1873) aforesaid, being the day of the return of the foregoing writ, comes into the circuit court here the said Robinson & Cox, by their said attorneys, and the marshal of the district aforesaid, to wit, Edward Y. Goldsborough, gentleman, to whom the foregoing writ was in form aforesaid directed, makes return thereof to the court here thereon endorsed, to wit:

Summoned, & copy of nar. left with def't.

E. Y. GOLDSBOROUGH, *Marshal.*

And the said James Hooper, being called, appears in court here by Thomas W. Hall and J. Nevitt Steele, his attorneys.

And thereupon the said Robinson & Cox, by their said attorneys, pray that the said James Hooper may answer to the declaration of them, the said Robinson & Cox, in the plea aforesaid.

7 Whereupon it is ruled by the court here that the said James Hooper answer to the declaration of the said Robinson & Cox in the plea aforesaid, or judgment will be rendered against him by default.

And afterwards, to wit, on the 21st day of March, in the year 1874, the said James Hooper, by his attorneys aforesaid, filed in court here the following pleas, to wit:

In the circuit court of the United States for the 4th circuit, in & for the district of Maryland.

JAMES HOOPER, TRADING AS JAMES HOOPER & CO., *ats* DOUGLAS ROBINSON & JAMES F. COX.

And the said defendant, by J. Nevitt Steele & T. W. Hall, j'r, his attorneys, as to the 1st, 2nd, 3 l, 4th, & 5' counts of the said plaintiffs' declaration, says that he never promised as alleged, & for a second & further plea to the said several counts, & each of them, says that he never was indebted as alleged.

J. NEVITT STEELE,
T. W. HALL, J'R,
Def'd't's Att'ys.

8 Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, and by order of the court here thereon is continued until the first Monday in April next.

At which said first Monday in April, in the year 1874, came into the circuit court here as well the said Robinson & Cox, by their attorneys aforesaid, as the said James Hooper, by his said attorneys.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of said parties, by their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday of November next.

At which said first Monday in November, to wit, in the year of our Lord one thousand eight hundred and seventy-four, come again into the

circuit court here as well the said Robinson & Cox, by their attorneys aforesaid, as the said James Hooper, by his said attorneys.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their tatorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in April next.

At which said first Monday in April, in the year of our Lord 1875, came into the circuit court here as well the said Robinson & Cox, by their said attorneys, as the said James Hooper, by his said at-
9 torneys.

Whereupon for trying the issue above joined, between the parties aforesaid, it is ordered by the court here that eighteen persons from the panel of petit jurors returned to the court here by the marshal of the district aforesaid be drawn by ballot according to the statute in such case made and provided; and thereupon the eighteen persons being so drawn by ballot and written upon two lists, one of which said list is delivered to the counsel for respective parties, and the counsel for each of the said parties having stricken out three persons from the said lists, thereupon the remaining twelve persons being called come, that is to say, David Prugh, Eugene S. Bantz, William Cox, William J. O. Wilkinson, Gilbert E. Bryson, W'm H. Hagans, John M. Irelan, Charles Young, Joseph H. Cadden, Thomas James, Joshua L. Bull, & Jacob Vance, who being empannelled, sworn to say the truth in the premises, upon their oath do say, that the said James Hooper did undertake and promise in manner and form as the said plaintiffs have above against him complained, and they assess the damages of the said plaintiffs to the sum of eight thousand and twelve dollars in gold.

Therefore it is considered by the court here that the said
10 Robinson & Cox recover against the said James Hooper as well the sum of eight thousand and twelve dollars in gold, the sum found by the jury, with interest from the 19th day of April, 1875, as the sum of thirty dollars and seventy-two cents, adjudged by the court here unto the said Robinson & Cox, on their assent, for their costs and charges by them about their suit in this behalf expended; and the said James Hooper in mercy, &c.

Memorandum: Before the jurors aforesaid withdrew from the bar of the court here, the said James Hooper, by his said attorneys, filed in court here the following bill of exceptions, to wit:

In the circuit court of the United States for the fourth circuit, in and for the Maryland district.

DOUGLAS ROBINSON & JAMES F. COX, TRADING as Robinson & Cox,
vs.
JAMES HOOPER, TRADING AS J. HOOPER & CO.

At the trial of this cause the plaintiffs, to maintain the issue on their part joined, offered in evidence to the jury, by William Willson, that he is and was in the years 1872–'73 agents for the United States Lloyds, and doing business in the city of Baltimore as
11 F. W. Willson & Son; that the policy now produced and offered by said witness in evidence was underwritten by the members of the United States Lloyds by their attorneys, the plaintiffs in this cause.

(Cargo)—Gold. No. 22706.

By the undersigned members of the United States Lloyds, Robinson & Cox, attorneys.

James Hooper & Co. on account of whom it may concern.
In case of loss to be paid to their order.
(The amount insured by this policy is expressed in the gold currency of the United States, and in case of loss such loss to be paid in that currency). Charges and expenses in currency to be reduced to the value of gold at time of payment.

Do make insurance and cause to be insured, lost or not lost, at and from ports and places to ports and places. On merchandise, to cover such risks as are approved and endorsed hereon, upon all kinds of lawful goods and merchandise laden or to be laden on board the good vessel or vessels whereof is master for the present voyage or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel or the master thereof is or shall be named or called.

Beginning the adventures upon the said goods and merchan-
12 dise from and immediately following the loading thereof on board the said vessel at as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at as aforesaid.

And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch, and stay at any ports or places,
Aggregate of sums insured $ if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued at ; as per endorsements.

Touching the adventures and perils, which we, the assurers, are contented to bear and take upon us in this voyage, they are of the seas, winds, waves, rocks, sands, shoals, and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers, or assailing thieves, barratry of the master and mariners, and all other losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, or any part thereof, occasioned by sea perils, subject, however, to such clauses, terms, and rates of average as are contained in the memorandum in this policy, unless otherwise agreed upon in writing. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants, and assigns,
to see, labor, and travel for, in, and about the defense, safeguard,
13 and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof we, the assurers, will contribute, each one in proportion to the rate and quantity of his sum herein insured.

And in case of loss such loss to be paid in thirty days after proof of loss and proof of interest in the said merchandise (the amount of any unpaid premiums and all other indebtedness of the assured being first deducted), but no partial loss or particular average shall in any case be paid unless amounting to five per cent. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then

we, the assurers, shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and we, the assurers, shall, respectively, return the premium upon so much of the sum by us assured as we shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, we, the assurers, shall nevertheless be answerable for the full extent of the sum by us subscribed hereto without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by us received in the same manner as if no such subsequent assurance had been made. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. Warranted by the assured not to abandon in case of blockade, and free from any loss or expense arising from capture, seizure, detention, or blockade, or any attempt thereat, or any of the consequences of the hostilities of nations, notwithstanding anything to the contrary in this policy, but in the event of blockade to be at liberty to proceed to an open port and there end the voyage. Warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hard ware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for stains or damage to the casks or other packages containing liquors or wet goods of any kind, nor for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel; and not liable for general average in consequence of loss on ice cargo. In case of claims for damage on dry goods or hardware exceeding fifteen per cent. the assurers to have the privilege of settling upon the principle of a salvage loss, paying to the assured the sum assured with the freight and duties paid thereon.

No outward shipment from the United States, or coastwise, or inland, within the same, is to be considered as insured under an open policy until approved and endorsed. Endorsements valued at the same, provided, however, that in coastwise or inland shipments within the United States, they do not vary from the cost more than ten per cent., and the sound value of such shipments at the port or place of destination is not to be deemed to exceed the same per cent. on the purchasing prices at the shipping port.

On freight risks: It is understood that the vessels are insured in such companies and valued at such amounts as are specified in the respective applications, and in case of omission, the highest valuation under which the vessel is insured in any policy, shall be the basis for ascertaining a technical total loss. In case of the actual or technical loss of the vessel, under the insurance upon her, a total loss of the freight to be paid under this insurance; any savings of freight then on board to be for the benefit of the assurers; but in case the vessel is not totally lost, the liability under this insurance is not to be greater than the actual loss by the disaster of the freight on board.

All approved endorsements on the pass-book given by us, the assurers, under this policy, are to apply in all respects to this policy the same

as if endorsed hereon, and not otherwise. Risks applicable hereto to be reported for endorsement as soon as known to the assured.

MEMORANDUM.—It is also agreed that dried beef, hams, bacon, fire-crackers and other fire-works, saltpetre, hops, guano, rice, peas and beans, mats and matting, hay, flaxseed and seed of all kinds, bleaching powders, soda-ash, bicarbonate of soda, salsoda, cream of tarter, camphor, burlaps, shoddy, hessiam, floor cloth, straw goods, gloves, bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, nails, steel, madder, sumac, wicker and willow ware (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, dye-woods of all kinds, mahogany and other woods, hempen-yarn, bags, cotton-bagging and other articles used for bags or bagging, pleasure carriages, household furniture and all house-furnishing articles, skins and hides, bristles, istle or Tampico grass, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by
17 the assured free from average, unless general; hemp, flax, tobacco stems, cassia, except in boxes, and oil-cake, free from average under twenty per cent., unless general; and sugar and bread are warranted by the assured free from average under seven per cent., unless general; coffee in bags or bulk, pepper in bags or bulk, and cassia in boxes, free from average under ten per cent., unless general.

On risks from China: Each ten packages of silk or other dry goods, in the order of invoice, subject to separate average. Each interest $5,000, of insured value or less subject to separate average. If over $5,000 value, each of the following kinds of teas: Imperial, Gunpowder Hyson, Hyson Skin, Young Hyson and Black teas; and each $5,000 value thereof in the order of invoice, subject to separate average; and the different excesses over $5,000, subject to average, if the damage amount to $250.

Amount of premium.
$
Policy 1.25
$

If the risks covered shall have begun and terminated before the date of this policy, then there shall be no return of premium on account of such termination of the risk.

In all cases of return of premium, in whole or in part, not less than one half per cent. upon the sum insured is to be retained by the assurers.

And so we the assurers are contented and do promise and bind
18 ourselves, severally and not jointly, nor the one for the other, our respective executors and administrators to the assured, their administrators or assigns, for the true performance of the promises, each one for his own part and for the amount herein assured by him only. Confessing ourselves paid the consideration for this insurance by the assured or his or their assigns at and after the nominal rate of the premium on each risk to be fixed at the time of endorsement with additions and deductions to be made when the character of the vessel and time of sailing are known.

In witness whereof we, the assurers, have subscribed our names and the separate sums insured by us individually, in the city of New York, this twenty-sixth day of October, in the year one thousand eight hundred and seventy-two.

(On the margin is printed the following to wit:) Warranted by the assured that shipments of grain from New York to foreign ports are not to proceed to sea without the certificate of, or approval of loading by, the grain inspector appointed by the New York Board of Underwriters.

Proof of loss to be authenticated by the agent of the assurers, if there be one at the place where such proofs are taken.

19 *Subscribers.*

John S. Williams, of Williams & Guion ..... $
W'm H. Guion, of Williams & Guion ..... "
Duncan, Sherman & Co ..... "
W. Butler Duncan, of Duncan, Sherman & Co ..... "
Emil Heineman, of Heinemann, Payson & Morgan ..... "
Francis Payson, of Heinemann, Payson & Morgan ..... "
James Brown, of Brown, Brothers & Co ..... "
George H. Brown, of New York ..... "
George S. Brown, of Alex. Brown & Sons, Baltimore ..... "
W'm H. Graham, of Alex. Brown & Sons, Baltimore ..... "
Babcock, Brothers & Co ..... "
Samuel D. Babcock, of Babcock, Brothers & Co ..... "
Benj. F. Babcock, of Babcock, Brothers & Co ..... "
Perkins, Livingston & Post ..... "
Drexel, Morgan & Co ..... "
J. Pierpont Morgan, of Drexel, Morgan & Co ..... "
Joseph W. Drexel, of Drexel, Morgan & Co ..... "
James B. Johnson, of I. Boorman, Johnston & Co ..... "
Robert Colgate & Co ..... "
Howland & Aspinwall ..... "
William Whitewright, jr ..... "
H. J. Barbey ..... "
Westray & Gibbs ..... "
Henry F. Spaulding, of Spaulding, Hunt & Co ..... "
George Bliss, of Morton, Bliss & Co ..... "
L. P. Morton, of Morton, Bliss & Co ..... "
Walter Hays Burns ..... "
20 John L. Aspinwall ..... "
Henry Eyre ..... "
F. Alexandre & Sons ..... "
F. Alexandre, of F. Alexandre & Sons ..... "
William Bee & Co ..... "
Thomas Galwey, of Galwey & Casado ..... "
Eugene Kelly, of Eugene Kelly & Co ..... "
C. C. & H. M. Taber ..... "
Charles C. Taber, of C. C. & H. M. Taber ..... "
Henry M. Taber, of C. C. & H. M. Taber ..... "
W'm H. Smith & Son ..... "
James R. Smith, of W'm H. Smith & Son ..... "
Brothers Boninger, Baltimore, Md ..... "
Spence & Reid, of Baltimore, Md ..... "
Lees & Waller ..... "
James Lees, of Lees & Waller ..... "
Henry B. Laidlaw, of Lees & Waller ..... "
Solon Humphries, of E. D. Morgan & Co ..... "
John T. Terry, of E. D. Morgan & Co ..... "
M. K. Jessup & Co ..... "
D. G. Bacon ..... "
S. B. Chittenden, of S. B. Chittenden & Co ..... "
Cha's Luling & Co ..... "
Cha's Luling, of Cha's Luling & Co ..... "

C. H. Marshall & Co ..... "
W. H. Appleton, of D. Appleton & Co ..... "
F. L. Brauns & Co., Baltimore ..... "
21 A. Iselin & Co ..... "
Adrian Iselin, of A. Iselin & Co ..... "
Thomas Eakin ..... "
Frederic Chauncey, of Fabbri & Chauncey ..... "
Edward W. Corlies, of John Caswell & Co ..... "
Olyphant & Co., China ..... "
James T. Sanford ..... "
John D. Wood ..... "
D. H. Baldwin ..... "
Henry Brigham, of Brigham, Holst & Co., Savannah ..... "
Horace B. Claflin, of H. B. Claflin & Co ..... "
Charles G. Francklyn ..... "
John Bates, of Cohassett ..... "
W'm Fellowes, of New York ..... "
W'm H. Lee, of Lee, Tweedy & Co ..... "
James Low, of Low, Harriman & Co ..... "
Oliver Harriman, of Low, Harriman & Co ..... "
Joseph T. Low, of Low, Harriman & Co ..... "
L. Von Hoffman & Co ..... "
Kennelberg & Co ..... "
Baltzer & Taaks ..... "
Riggs & Co ..... "
John Elliott, of Riggs & Co ..... "
Erastus Corning, of Albany ..... "
Samuel Thompson's Nephew & Co ..... "
W. G. Taaks, of Baltzer & Taaks ..... "
John W. Mason, of Sam'l Thompson's Nephew & Co ..... "
22 Charles H. Blake, of John W. Mason & Co ..... "
C. C. Baldwin, of New York ..... "
P. Adams Ames, of Page, Richardson & Co ..... "
Nickerson & Co., of Boston ..... "
R. R. Graves & Co ..... "
M. Morgan's Sons ..... "
F. Nickerson & Co., of Boston ..... "
John A. Burnham, of Boston ..... "
P. L. Everrett ..... "
Amos A. Lawrence, of Boston ..... "
Martin Bates, j'r, & Co ..... "
Martin Bates, of Martin Bates, j'r, & Co ..... "
F. R. Fowler, of F. R. & W. C. Fowler & Crampton ..... "
W'm K. Hinman, of W'm K. Hinman & Co ..... "
W'm S. Tisdale, of W'm S. Tisdale & Co ..... "
Edward G. Tinker, of Morgan & Tinker ..... "

ROBINSON & COX, *Att'ys.*

Date.	Vessels.	From to—	Am't insured.	Rate.	Prem.	Remark.
1872. Oct. 26	S't Carolina.	Balto. to Queenstown for orders, to a port of discharge in U. Kingdom, except west coast of Ireland, also England & Scotland, north of Newcastle & Glasgow.	$8,000	1¼—30	80	Paid advance to cover disbursements & repairs.

F. W. WILSON & SON, *A.*

23 That the application for the said insurance was made through witness by the defendant Hooper, who said that he had disbursed so much money for the ship. Witness made a memorandum of said application, and the policy was made out and underwritten in accordance with said application, and executed as by said policy appears; that the amount of insurance endorsed thereupon was filled in as soon as the amount of his disbursements was declared by defendant. Said witness further testified, as an expert, that the policy is in the usual form of a policy on cargo, and that a policy on vessels would contain other and different stipulations. Witness heard of the loss of the steamship Carolina, referred to in said policy, on Nov. 28th, 1872. The loss was reported to have taken place Nov. 14. The protest was presented to witness by the defendant Dec. 6th, 1872, with statement of his account.

(Copy.)

Outfits and disbursements of Br. steamer Carolina.

1872.						
Oct.	3.	To cash paid			telegrams: Norfolk, 1.74; Europe, 14.23	15 97
"	9.	"	"	"	Br. consul, Norfolk 281 62	
					Pilotage returned 46 06	
						235 56
"	10.	"	"	"	G. Bennett, 1.00; pilotage in w'd, 101.34	102 34
"	12.	"	"	"	towage assistance at wh'f	7 00
"	14.	"	"	"	I. N. Steele, att'y, retainer	300 00

2

"	25.	"	"	"	towage, 27.00 and 10.00	37 00
"	"	"	"	"	telegram to Europe 12.85 & 14.00	26 85
"	"	"	"	"	wharfage on coal	31 46
"	"	"	"	"	S. M. Johnson, " 30 tons	147 00
"	"	"	"	"	E. J. Codd & Co., machinists	1,083 00
"	"	"	"	"	barge hire for corn discharged	196 00
"	"	"	"	"	ins. on corn discharged	5 63
"	"	"	"	"	Tho's M. Norris, for protest	25 00
"	"	"	"	"	U. S. commissioner's fee	34 85
"	"	"	"	"	water bill, 7.00; chronometers, 11.00 ..	18 00
"	"	"	"	"	John H. Keener, repairing lamps	34 87
"	"	"	"	"	Henry Boss, plumber	37 10
"	"	"	"	"	W'm B. Peregoy, pump	20 18
"	"	"	"	"	Cha's F. King, boat-builder	132 11
"	"	"	"	"	W'm Smith, rigger	82 50
"	"	"	"	"	W'm M. Newton, painter	130 00
"	"	"	"	"	Henderson wharf	81 38
"	"	"	"	"	A. Dausche, stevedore	155 00
"	"	"	"	"	E. Bailey & Co., rope, &c	483 22
"	"	"	"	"	" " " hawser	265 86
"	"	"	"	"	Wellner & Buck, carpenter'	599 76
"	"	"	"	"	L. Wagner, joiner	738 65
"	"	"	"	"	J. E. Cullimore (smith)	619 47
"	"	"	"	"	watchman, 7.50, 25.50	33 00
"	"	"	"	"	D'r Page, 26.00; W'm B. Hooper, 167 00	193 00
"	"	"	"	"	Capt. Macgarr	141 45
"	"	"	"	"	attending as witness, 15.55, 2.50	18 05

25

Oct. 25.	To cash paid M'r's Clark (board master)	96 00
" " " " "	riggers' labor	17 50
" " " " "	Peter Murphy, labor on coal	106 50
" " " " "	Jesse Thurlow, board	170 00
" " " " "	Cha's W. Bobart	382 50
" " " " "	Jno. E. Hooper, ⅜	120 00
" " " " "	I. Cromwell, sails	46 35
" " " " "	Cha's W. Geekie	17 00
" " " " "	postage	60
" " " " "	shipping-master, attendance	75 00
" " " " "	M'r's H. Mankin, board	160 00
" " " " "	butcher's bill	85 51
" " " " "	pilotage outward	97 50
" " " " "	insurance on advances	117 33
" " " " "	surveyors	50
	Amount carried forward	$7,573 05
Oct. 25.	To cash p'd Br. consul	17 87
" " " " "	shipping crew	218 00
" " " " "	towage outward	50 00
" " " " "	custom-house	2 20
" " " " "	James C. Coale	42 68
" " " " "	commissions attending ship's business	395 19
		$8,298 99

E. E.
Baltimore, Oct. 26th, 1872.
(Signed) R. T. MACGARR,
Master.
J. HOOPER & CO.,
Per S. E. HOOPER.

26 *Br. steamer Carolina in account with J. Hooper & Co.*

1872.

Oct. 26.	To cash p'd as per disbursement ⅜	8,298 99
	" commission on advances, say, $8,298.99@5%	414 95
	" commission on value of cargo discharged, say, $3,000.00@1%	30 00
		$8,743 94

E. E.
Baltimore, Oct. 26th, 1872.
(Signed) R. T. MACGARR.
J. HOOPER & CO.,
Per S. E. HOOPER.

The protest and account were presented by defendant in response to a demand for proof of loss and interest under the policy, and were forwarded by witness to the plaintiffs. On January 4th, 1873, the defendant notified witness that the claim would mature next day, being thirty days after proof. There was some delay in making payment, but witness was finally instructed by the parties in New York, the plaintiffs, to draw upon them at 5 days' sight for amount of insurance, adding $12 for interest. Witness produces draft dated January 15th, 1873.

BALTIMORE, 15 *January*, 1873.

$8,012.00 gold.

27 At five days' sight pay to the order of Mess'rs J. Hooper & Co. eight thousand and twelve dollars, value received, and charge the same to account of, as advised, in gold.

Yours, &c.,

F. W. WILLSON & SON, *Ag'ts.*

To Mess'rs ROBINSON & COX,
Att'ys United States Lloyds, 52 William S't, New York.

No. 95.

(On the margin:) F. W. Willson & Son.
(Across the face:) True copy of draft. F. W. W. & Son.

Hooper objected to making an assignment until the money was actually paid. Witness had a printed form of assignment for that purpose, but upon Hooper's objecting to assign before maturity and payment of draft, took his receipt, now produced, dated Jan'y 15, 1873.

Received, Baltimore, 15 January, 1873, from the United States Lloyds, through F. W. Willson & Son, ag'ts, a draft on them at five days' sight for eight thousand and twelve dollars in gold, which when paid to be a settlement in full for claim for total loss of advances for disbursements and repairs per steamer Carolina, Balto. to Queenstown, for orders, &c., insured 26th Oct., 1872, under policy No. 22706.

$8,000
12—9 days' interest at 6%.

$8,012 gold.

And at which time we promise to assign all our right, title, and
28 interest in the above advances for disbursements and repairs to U. S. Lloyds.

(Signed) J. HOOPER & CO.

Hooper subsequently executed the assignment of Feb'y 10, 1873, now produced, as follows:

(Copy.)

For and in consideration of the sum of eight thousand dollars in gold, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer, cede, and abandon to Robinson and Cox, attorneys, and in trust for the persons issuing the policy hereinafter mentioned, all our right, title, and interest in and to the property hereinafter specified, and in and to the proceeds thereof, and all that can or may be made, saved, or realized from the damage or loss reported to have occurred, by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at their risk and expense) to make, save, and realize the said property or its proceeds, to wit, amount paid by us, being advances for disbursements and repairs, as per list, on the steamer Carolina, bound from Baltimore to Queenstown, for orders, &c., and covered by insurance at the United States Lloyds, under the attorneyship of Robinson and Cox, by
29 policy No. 22706, dated October 26, 1872.

J. HOOPER & CO.

BALTIMORE, *Feb'y* 10, 1873.

BALTIMORE, MD., *ss:*

I, James Hooper, of the firm of James Hooper & Co., of the city of Baltimore, hereby testify that to the best of my knowledge and belief there was no other insurance on the amount paid by us, being advances for disbursements and repairs of the steamer Carolina on her late voyage from Baltimore to Queenstown for orders, except the insurance at the United States Lloyds, by the policy issued under the attorneyship of Robinson & Cox for the sum of eight thousand dollars in gold.

And I further testify that all risks that could apply to the said policy have been correctly reported to Robinson & Cox for endorsement thereon.

JAMES HOOPER.

Sworn before me this 10th day of February, 1873.

TH. HARRIS HODGES,
Notary Public for the State of Maryland,
residing in the city of Baltimore.

[Stamp.]

30 Hooper declined to execute the same until he had consulted counsel. Said assignment was upon one of the printed blanks filled up in the usual form, such as witness uses in all cases, to be filled up according to circumstances. The affidavit before a notary appended thereto is also in the usual form. Witness had no knowledge then that Hooper had been paid his advances. First learned that fact on occasion of Krebs' visit to Baltimore, in March, 1873. Then learned it from M'r Hooper, who said he had received a draft for his advances. Witness himself made no special demand upon M'r Hooper for repayment. On cross examination same witness further testified that the words "in any way," in the printed form, were erased in the assignment, witness thinks at M'r Hooper's instance. Witness did not make the erasure. Witness filled up the blank. The form of assignment is such as is taken in all cases of abandonment or total loss. Witness did not ask M'r Hooper whether he was insuring for himself or for others. It is not usual to ask such questions. The remarks in the policy were Hooper's representations and plaintiff's means of knowledge. Did not ask Hooper whether he had been paid, when demand was made
31 by him for the insurance money. It is not usual to ask respectable houses such questions. Witness paid the insurance money without asking the question. The plaintiff further offered in evidence by Andrew F. Higgins, that plaintiffs Robinson and Cox were partners, and citizens and residents of New York. Witness has had 30 years' experience in insurance business. Being shown the policy in the case, witness testified as an underwriter that an insurance on vessels would contain very different stipulations from the policy produced; there would be separate policies for each vessel; never issue a general policy on vessels. Advances for repairs of vessel are not a lien on cargo, or insurable as such, but are frequently endorsed on cargo policies. Upon cross-examination same witness testified that insurance on advances, taking the risk of loss of vessel, would be made on such a policy as the one in evidence. The stipulations requisite in vessel policies are not required in insuring advances, and consequently the latter are usually endorsed for insurance on cargo policies.

Plaintiffs then gave in evidence by William Krebs that he resides in New York and is a marine adjuster; that he came to Baltimore in March, 1873, as an average adjuster, to ascertain who owed M'r

32 Hooper for his advances, and to adjust the account; came to Baltimore for information; had a long interview with M'r Hooper, who was reticent, but said that the money had already been paid to him previously to his collecting the loss on the policy; did not urge M'r Hooper to write to the parties on the other side to send the insurance money back; cannot recollect the conversation precisely; may have suggested to M'r Hooper to write to the parties to refund; told Hooper that if Good Bros. & Co. had repaid him his advances, he ought to repay us. This he emphatically declined to do.

Plaintiffs then offered in evidence duplicate of the draft given by the captain of the Carolina to J. Hooper & Co. for the amount of their advances, being the third of exchange on Good Bros. & Co., Hull, England, which bill of exchange it was admitted was sold by defendant, after having been endorsed by him about the day of its date, to Alex. Brown & Sons, Baltimore, bankers, who remitted it to their correspondents, Messrs. Brown, Shipley & Co., London, Oct. 29th, 1872. Said bill was accepted Nov. 11th, 1872, and paid Dec'r 14th, 1872.

Exchange for £1,611 18. 7. BALTIMORE, *October 26th*, 1872.

③ Thirty days after sight of this third of exchange, first and second
33 unpaid, pay to the order of J. Hooper & Co., payable in London, sixteen hundred & eleven pounds eighteen shillings and seven pence, Br., sterling, value received, and charge the same to account for advances for repairs and disbursements of steamship Carolina & her freight to enable the ship to proceed on her voyage.

Your ob'd't serv't,

R. T. MACGARR, *Master*.

Mess. GOOD BROTHERS & Co.,
19½ *High St., Hull, Eng.*

(Endorsed:) J. Hooper & Co.

It was further admitted that plaintiffs were the attorneys, duly authorized, of the underwriters in the policy of insurance given in evidence. Whereupon the plaintiffs rested their case.

And the defendant, to maintain the issue on his part, thereupon gave in evidence to the jury, by James Hooper, the defendant, that he made the insurance in question by direction and authority of Capt. Macgarr, the master of the Carolina, to protect his friends, Good Bro's & Co., on whom he drew the draft just offered in evidence by plaintiffs. That witness was agent for the ship, which was consigned to him. That after her misfortune by collision in the bay, when the ship put back for repairs, witness paid the bills; and when the bills were all made
34 out, the captain ordered witness to cover the amount of his draft by insurance. That the insurance premium was charged to the ship and paid for by master—that is, by his draft. Witness remitted the insurance money as soon as collected from plaintiffs to Good Bros. & Co., deducting something due to witness on account, and now produces duplicate of draft, third of exchange, on Brown, Shipley & Co., London:

[Brown Brothers & Co.]

£1,505 11s. 3', st'g. BALTIMORE, *January 31st*, 1873.

Sixty days after sight of this third of exchange (first and second unpaid) pay to the order of J. Hooper & Co. fifteen hundred & five pounds

eleven shillings & three pence, st'g, value received, which place to account of

ALEX. BROWN SONS.

Mess'rs BROWN, SHIPLEY & Co.,
London.

No. 1931.

(Endorsed:) Pay to the order of Good Brothers & Co., Hull, England.
J. Hooper & Co.

by which witness made remittance. In the assignment witness signed, the words "in any way", in printed form, were erased by witness. Witness told M'r Willson that he had no interest in the matter, but, as it was customary, would sign the paper. M'r Krebs came to wit-
35 ness's office subsequently to the payment and asked witness to write to his friends on the other side to return the insurance money. Witness asked him if he did not get the premium for insuring? He said, "Yes." If the vessel was not lost? He said, "Yes." Witness then said he "would not have the face to write to the parties to return the money." Witness, being cross-examined, further testified that he held the insurance as collateral for his own advances; that was the understanding between the captain and witness—that is, if the draft had not been paid witness would not have remitted the money, when collected, of course. The captain directed witness to insure to protect his friends; it also protected him. On November 27th, witness believed that said draft was accepted; witness had received no notice of protest. Witness filed with Willson his statement of loss and the protest. Wit- did not communicate to Willson the fact that he had been paid. Witness knew before January 15th, 1873, that the master's draft had been paid. The draft of Willson on Robinson & Cox given in evidence was paid in New York January 24th, 1873, and the proceeds of it were remitted by witness January 31st. Witness told Willson at the
36 time of receiving the draft last mentioned that he had nothing to assign. Willson said it was customary to give a receipt, and witness did so.

The assignment given in evidence witness signed in his own office, and he there struck out the words "in any way." Witness does not think he told Willson he had done so.

And thereupon defendant rested his case.

And thereupon the plaintiffs further offered in evidence to the jury, by William Krebs, that after Hooper had told that he had got the money for his advances, witness may have told him, as he states, to write to his friends to refund, but the first intimation that Hooper had been paid his advances came from him.

Whereupon, the evidence on both sides being closed, the plaintiffs, by their counsel, prayed the court to instruct the jury as follows:

Plaintiffs' prayers.

1. The plaintiffs pray the court to instruct the jury that if they find that the defendant, trading as James Hooper and Company, made with the plaintiffs the contract of insurance under the policy and its endorsements given in evidence, and after the total loss of the steamer "Carolina," mentioned in the policy, made the claim of loss and proof
37 of interest given in evidence, by presenting to the agents of the plaintiffs in Baltimore, the copy of the protest of the captain of said steamer and his own account for advances for repairs and supplies

to said steamer, as proved by the witness Willson, and shall further find that upon the plaintiffs agreeing to pay the loss, upon said proofs, the defendant obtained from the agents of the plaintiffs in Baltimore, the draft for $8,012, gold, dated January 15th, 1873, and signed the receipt dated January 15th, 1873, given in evidence, and that after the payment to him by the plaintiffs of the said draft, mentioned in said receipt, the defendant executed the assignment dated February 10th, 1873, and made the affidavit thereto given in evidence; and if the jury shall further find that on the day of the date of said policy, the defendant further to secure the repayment of the advances insured under said policy, took from the master of said steamer his bill of exchange, given in evidence, which the defendant immediately sold to Mess'rs Alexander Brown & Sons, and that said bill of exchange was duly accepted November 11th, 1872, and paid December 14th, 1872, of which acceptance and payment the defendant had notice before his said receipt, dated January 15th, 1873, was given; and if the jury shall further find that neither the plaintiffs nor their said agents in Baltimore
38 had any knowledge of the drawing of said bill of exchange, and its transfer and payment, or that any other person claimed or could claim any insurable interest under said policy, except the defendant, until March, 1873, and that then the plaintiffs demanded of the defendant a return of the amount paid by them to him on the said draft dated January 15th, 1873, which was refused, then the plaintiffs are entitled to recover the amount so paid by them to the defendant.

(Rejected.)

2. That if the jury find the facts in the plaintiffs' first prayer, the defendant was, on January 15th, 1873, not entitled to claim that the amount of his advances were still insured under said policy, for his said advances had been fully repaid to him by his sale of the captain's bill of exchange to Mess'rs Alexander Brown & sons, and its payment to them by Mess'rs Good Bro's & Co., of Hull, on December 14th, 1872.

(Rejected.)

3. That if the jury find the facts in the plaintiffs' first prayer, the defendant was not entitled to claim the amount insured under said policy on behalf of the owner of said steamer.

1st. Because said insurance was on cargo or merchandise and under a cargo policy.

39 2d. Because the owners of said steamer had no insurable interest in the advances covered by said policy.

3rd. Because in the claim of loss and proof of interest under which the plaintiffs made the payment sought to be recovered in this action, the defendant did not set up or rely on any claim or insurable interest on the part of such owners, but on the contrary in the account given as proof of interest, and in the receipt and assignment and the affidavit thereto given in evidence, the defendant set up only his own claim as the party making the advances, which were insured under the policy.

4th. Because if the claim had been been disclosed and fairly made on the part of the owners, it could have been successfully resisted for want of interest, and also because of want of proof that there was not a full prior insurance on the part of such owners.

(Rejected.)

4. That the policy and its endorsement are the only evidence of the parties, and their interest insured under said contract, but if the defendant can rely upon the authority of the master, spoken of by him in his testimony, as lega levidence of his, the defendant's, intention
40 to make said insurance for other parties beside himself (which

plaintiffs deny), such authority on the part of the master could only authorize the defendant to insure his owners' interest (if any), under said contract, and such interest was not covered by the terms and circumstances of this contract for the reasons stated in plaintiffs' 3d prayer.

(Rejected.)

5. That if the jury finds the facts in the first prayer of the plaintiffs the defendant was not entitled to claim the amount insured under said policy and endorsement for Mess'rs Goode Bro's & Co., the drawers of said bill of exchange, for they had, as such drawers, no insurable interest in said advances.

(Rejected.)

And the defendant by his counsel prayed the court to instruct the jury.

Defendant's prayer.

If the jury believe from the evidence that the Bristol Steamer Carolina, on a voyage from Baltimore to Queenstown, was so injured by collision with a schooner that it became necessary for her to return to the port of Baltimore for repairs, and that upon her said return she
41 was consigned to the defendant, trading under the name of James Hooper & Co., and he made the necessary advances for the repairs and disbursements of the said steamer, and that the master of said steamer gave to the defendant a bill of exchange drawn in his favor on Good Brothers & Co., of Hull, England, for the amount of said advances, including therein the premium of insurance on said advances, and directed the defendant to effect insurance on the said advances for the protection of his friends, the said Good Brothers & Co., upon whom he drew, and that the defendant in pursuance of said direction and for the protection of the said Good Brothers & Co., obtained from the plaintiffs the policy of insurance offered in evidence, and that said Good Brothers & Co., accepted and paid the said bill of exchange as stated in the evidence; and shall also find that the said steamer was abandoned at sea and lost on the voyage insured in said policy, and that the defendant afterwards, by direction of Good Brothers & Co., presented to the plaintiffs proofs of the loss, and demanded payment of said insurance, and upon request of the plaintiff furnished them with the account of said advances offered in evidence, in that, therefore, the plaintiffs paid to the defendant the amount of said insurance, taking from him the written abandonment offered in evidence, and without having made any inquiry of
42 him as to whether he was collecting the said insurance for himself or for some other person or persons, and that within a few days after receiving the insurance money the defendant accounted for and paid it to Good Brothers & Co., in the manner stated in the evidence, then the plaintiffs are not entitled to recover in this action.

(Rejected.)

And thereupon the court rejected the whole of said prayers, as well that offered on the part of the defendant as those offered on the part of the plaintiffs, and instructed the jury as follows:

Courts' instructions.

If the jury shall find from the evidence in this case, that when the de-

fendant made his claim for indemnity on the United States Lloyd's under the policy offered in evidence he produced the account and subsequently made the receipt and assignment offered in evidence; and that when he received payment of said insurance and made and executed said assignment, he had already received notice of the payment of the draft given by him to cover said advances and which fact he did not communicate to the underwriters, then the plaintiffs are entitled to re-
42 cover the amount paid by them to the defendant. To which rejection of the defendant's said prayer, and also to the said instructions given to the jury by the court, the defendant, by his counsel, then and there asked leave to reserve an exception, and that the court would sign and seal this his bill of exceptions, which is accordingly done this nineteenth day of April, eighteen hundred and seventy-five.

WILLIAM F. GILES. [SEAL.]

And afterwards, to wit, on the 15th day of September, in the year of our Lord 1876, the said James Hooper produced the writ of the United States of America for the correcting of errors of and upon the premises, commanding that the judgment aforesaid, so as aforesaid rendered, with all things thereunto relating, be transmitted to the Supreme Court of the United States of America to be held at Washington on the second Monday of October next, the tenor of which writ is as follows, to wit:

44

45 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

The President of the United States of America to the judges of the circuit court of the United States for the fourth circuit in and for the district of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the [SEAL.] judgment of a plea which is in the said circuit court before you, or some of you, between Douglas Robinson and James F. Cox, trading as Robinson & Cox, plaintiffs, and James Hooper, defendant, a manifest error hath happened, to the great damage of the said James Hooper, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of our
46 Supreme Court, the fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Issued the fifteenth day of September, 1876.

JAMES W. CHEW,
Clerk Circuit Court.

47 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To Douglas Robinson and James F. Cox, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein James Hooper is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal this 18th day of September, in the year of our Lord one thousand eight hundred and seventy-six.

WILLIAM F. GILES. [SEAL.]

Service acknowledged this 28th day of September, A. D. 1876.

BROWN & BUME,
For Def'ts in Error.

48

49 In pursuance whereof and according to the statute in such case made and provided, a record of the said judgment, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said Supreme Court accordingly.

Writ-of-error bond.

Know all men by these presents that we, James Hooper and Edward J. Codd, of Baltimore City, State of Maryland, are held and firmly bound unto Douglas Robinson and James F. Cox in the full and just sum of three hundred dollars, lawful money of the United States, to the payment whereof, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this eighteenth day of September, in the year of our Lord eighteen hundred and seventy-six.

Whereas lately, at a circuit court of the United States for the fourth circuit in and for the district of Maryland, in a suit pending in said court, wherein Douglas Robinson and James F. Cox were plaintiffs and James Hooper was defendant, judgment was rendered against
50 the said James Hooper, and the said James Hooper having sued out a writ of error to reverse said judgment:

Now, the condition of the above obligation is such that if the said James Hooper shall prosecute his writ of error to effect, and, if he fail to make his plea good, shall answer all costs, then the above obligation to be null and void; otherwise to be and remain in full force and virtue.

JAMES HOOPER. [SEAL.]
EDWARD J. CODD. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN H. LOWE.

Which said bond is thus endorsed, to wit:

"Bond approved 18th Sept., 1876.

"WILLIAM F. GILES."

In testimony that the aforegoing is a true copy of the record and proceedings of the circuit court of the United States for the fourth circuit and district of Maryland in the cause aforesaid, I have hereunto subscribed my name and affixed the seal of the said circuit court this 28th day of September, 1876.

[SEAL.] JAMES W. CHEW,
Clerk Circuit Court.

(Indorsement on cover:) No. 170. James Hooper, plaintiff in error, vs. Douglas Robinson and James F. Cox, as Robinson & Cox. Maryland C. C. U. S. Filed 29th September, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 170.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

JAMES HOOPER, PLAINTIFF IN ERROR,

VS.

DOUGLASS ROBINSON AND JAMES F. COX, AS ROBINSON & COX, DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

I NEVETT STEELE,
THOMAS W. HALL,
Of Counsel for Plaintiff in Error.

D

SUPREME COURT OF THE UNITED STATES.

No. 170.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

JAMES HOOPER, PLAINTIFF IN ERROR,

vs.

DOUGLASS ROBINSON AND JAMES F. COX, AS ROBINSON & COX, DEFENDANTS IN ERROR.

Brief of Plaintiff in Error.

STATEMENT OF FACTS.

This is an action of *assumpsit* instituted by the defendants in error, as agents and attorneys of the United States Lloyds, to recover back from the plaintiff in error, the agent of correspondents in England, for whose protection he had effected insurance, the sum of $8,012 in gold, the amount of a marine policy which he had collected after a total loss and remitted to his principals.

The British steamship *Carolina*, having put back to Baltimore in distress after a collision, and having been repaired there at considerable expense, the master, Macgarr, drew his draft for the amount of the necessary disbursements and repairs, on Good Brothers & Co., of Hull, England, payable thirty days after sight, in favor of Hooper, the plaintiff in error, to whom the steamer had been consigned, instructing Hooper at the same time to cover the amount of the draft by insurance, (Record, p. 14,) and including in the draft the amount of the insurance premium.

The master's draft for £1,611 18s. 7d., dated October 26, 1872, will be found on page 14 of the Record. On the same day, as directed by the master, the plaintiff in error effected the insurance in question in this cause. The policy dated October 26, 1872, in favor of "James Hooper & Co., *on account of whom it may concern. In case of loss to*

be paid to their order," will be found on pp. 5–9 of the Record. On the policy, which is in the form of a cargo policy, such as, according to the testimony of the insurance expert Higgins, a witness produced at the trial by the plaintiff below, it is customary to use, in making insurance on advances, taking the risk of the vessel, (Higgins, p. 13,) is the following endorsement:

Date.	Vessels.	From	Amount insured.	Rate.	Prem.	Remarks.
1872. Oct. 26	S't Carolina.	Balto. to Queenstown for orders to a port of discharge in United Kingdom, except west coast of Ireland; also England and Scotland, north of Newcastle and Glasgow.	$8,000	1¼–20	80 *paid*	Advance to cover disbursements and repairs.

On the part of the underwriters no inquiry was made of Hooper as to whether he was insuring for himself or for other persons; and the only representations made by him in procuring the insurance are embraced in the above extracts from the policy. [Record, p. 13, cross-examination of Willson, Baltimore agent U. S. Lloyds.]

Hooper made the disbursements, paid the bills for repairs, getting the money for the draft from Alex. Brown & Sons, bankers, in Baltimore, to whom he endorsed it, on or about the day of its date, and who remitted it, on the 29th day of October, 1872, to their correspondents, Brown, Shipley & Co., in London. (Record, p. 14.)

It will thus be observed that the advances, disbursements, insurance and draft were all made and drawn and the draft endorsed and sold by Hooper to Alex. Brown & Sons, on or about the same day, the 26th of October, 1872, and that all these acts were parts of one and the same transaction.

On the 11th of November, 1872, the draft was accepted by Good Brothers & Co. in England On the 14th of November the *Carolina* foundered at sea. On the 28th of November the Baltimore agent of the underwriters received notice of the loss of the vessel. On the 6th of December, 1872, in response to a demand for proof of loss and interest, the Baltimore agent of the underwriters was furnished by Hooper with the protest (not in the Record) and the detailed statement of the items of "Outfits and Disbursements of British steamer Carolina," charged for the most part under date of October

25, 1872, to be found on pages 10–11 of the Record, and in which will be found this item:

"To cash paid *insurance on advances*, $117.33."

This statement of account, with the protest, were by the agent forwarded to his principals in New York, the defendants in error. (Willson, p. 11.)

On the 14th of December, 1872, the draft given by the master for the amount of the advances was paid by Good Brothers & Co. On January 4th, 1873, the Baltimore agent of the underwriters was notified that the claim would mature the next day, being thirty days after proof.

There was delay on the part of the underwriters in making payment, but finally the agent was instructed by his principals, the defendants in error, to draw upon them in New York, at five days sight, for the amount of the policy, adding $12 for interest. This was accordingly done, the agent's draft in favor of J. Hooper & Co. for $8,012, gold, bearing date January 15, 1873. This draft was paid by the defendants in error in New York January 24, 1873, and on January 31st, 1873, the proceeds were remitted by Hooper to Good Brothers & Co. in England by draft of Alex. Brown & Sons on Brown, Shipley & Co., of London.

During all these transactions Hooper was still never asked by the defendants in error, or by anybody for them, whether he had insured for himself or for others, or whether he had been or expected to be repaid for his disbursements, or whether any one else was interested in the policy, or for whom he was collecting the insurance. When he received, on the 15th January, 1873, the draft for the amount of the insurance, he gave the receipt, on page 12 of the Record, at the same time telling the agent of the underwriters, to whom he gave it, "*that he had nothing to assign.*" (Record, p. 15.) He signed the receipt in the form in which it appears, because the agent told him "it was customary" to do so. (Ibid.) On the 10th of February, 1873, Hooper, at the request of the underwriters, through their agent, signed the "assignment," which is also on page 12 of the Record, and which was a printed form filled up by the agent, "such as is taken in all cases of abandonment or total loss." (Willson, p. 13.) Hooper again told Willson (the agent of the underwriters) "*that he had no interest in the matter, but, as it was customary*, he would sign the paper." (Record, p. 15.)

Sometime afterwards, in March—more than a month after the loss had been paid, and the money remitted by Hooper to England, a Mr.

Krebs, a marine adjuster residing in New York, came to Baltimore "to ascertain who owed Mr. Hooper for his advances." (R. pp. 13, 14). This was the first inquiry of any kind made by the underwriters. Hooper testifies, (R. p. 15) and Krebs on cross-examination admits (p. 14) that the latter suggested to Hooper "to write to his friends on the other side to refund the money." Hooper asked Krebs "if he did not get the premium for insurance? He said 'Yes.' If the vessel was not lost? He said 'Yes.'" Hooper then said he "would not have the face to write to the parties to return the money."

The Underwriters have never offered to return to Hooper or to Good Brothers & Co. the premium for insurance.

On the 30th of October, 1873, more than *nine months* after the insurance had been paid to Hooper and by him remitted to Good Brothers & Co., and more than *seven months* after the conversation between Hooper and Krebs, this suit was brought by the Underwriters against Hooper.

Judgment was entered on verdict for plaintiffs below for $8,012 in gold.

The questions of law presented for review by the single bill of exceptions, are involved in the instructions given by the Circuit Court to the jury, and the Court's refusal to grant the instruction requested by the plaintiff in error.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following as errors, to wit:

1. The court erred in instructing the jury as follows, namely:

"If the jury shall find from the evidence in this case, that when the defendant made his claim for indemnity on the United States Lloyds under the policy offered in evidence, he produced the account and subsequently made the receipt and assignment offered in evidence, and that when he received payment of said insurance, and made and executed said assignment, he had already received notice of the payment of the draft given to him to cover said advances, and which fact he did not communicate to the Underwriters, then the plaintiffs are entitled to recover the amount paid by them to the defendant." (Record, p. 17, p. 18.]

2. The Court erred in refusing to instruct the jury as prayed by the Defendant as follows:

"If the jury believe from the evidence that the British steamer Carolina, on a voyage from Baltimore to Queenstown, was so injured by collision with a schooner that it became necessary for her to return to the port of Baltimore for repairs, and that upon her said return she was consigned to the defendant, trading under the name of James Hooper & Co., and he made the necessary advances for the repairs and disbursements of the said steamer, and that the master of the said steamer gave to the defendant a bill of exchange drawn in his favor on Good Brothers & Co., of Hull, England, for the amount of said advances, including therein the premium of insurance on said advances, and directed the defendant to effect insurance on said advances for the protection of his friends, the said Good Brothers & Co., upon whom he drew, and that the defendant in pursuance of said direction and for the protection of the said Good Brothers & Co., obtained from the plaintiffs the policy of insurance offered in evidence, and that said Good Brothers & Co. accepted and paid the said bill of exchange as stated in the evidence; and shall also find that the said steamer was abandoned at sea and lost on the voyage insured in said policy, and that the defendant afterwards by direction of Good Brothers & Co., presented to the plaintiffs proofs of the loss, and demanded payment of said insurance, and upon request of the plaintiff furnished them with the account of said advances offered in evidence, and that thereupon the plaintiffs paid to the defendant the amount of said insurance, taking from him the written abandonment offered in evidence, and without having made any inquiry of him as to whether he was collecting the said insurance for himself or for some other person or persons, and that within a few days after receiving the insurance money the defendant accounted for and paid it to Good Brothers & Co., in the manner stated in the evidence, then the plaintiffs are not entitled to recover in this action." (Record, p. 17.)

STATEMENT OF POINTS.

I.

The loss which the underwriters have paid, and which they are now seeking to recover back in this action, was an insurance of "advances to cover disbursements and repairs" on the British steamship *Carolina* in the port of Baltimore. It is not questioned that the "advances" were made, or that the "disbursements and repairs"

were necessary. That such advances constitute an insurable interest is conclusively settled by the decision of this Court in

Insurance Company *vs.* Barings, 20 Wall. 163–4, and cases cited in opinion of Court (margin.)

II.

In the present case, the master of the *Carolina* drew on his friends, Good Brothers & Co., of Hull, England, in favor of Hooper, the plaintiff in error, for the amount of the disbursements and repairs, including in the draft the premium paid the defendants in error for the insurance which he, the master, directed Hooper to effect for the protection of Good Brothers & Co., on whom the draft was drawn. Hooper made the disbursements, paid the bills for repairs, got the money for the draft from the bankers, to whom he endorsed it, paid the premium and effected the insurance by taking out the policy in the case, "on account of whom it may concern," loss, if any, payable to his (Hooper's) order, all on or about the same day, the 26th day of October, 1872. Good Brothers & Co. promptly accepted the draft, which had been immediately forwarded by the bankers, the date of their acceptance being November 11th, prior to the loss of the ship, and paid it at maturity, December 14th. Thus Good Brothers & Co. fully ratified and adopted everything which had been done for them. The advances were substantially made by them, as the insurance was undeniably effected for their protection.

III.

The present case is stronger than the case in 20 Wallace, 163-4. That was a suit brought by the assured upon the policy, and the burden of proving an insurable interest was upon the plaintiffs. In this case neither Good Brothers & Co., for whom the insurance was effected, nor Hooper, who effected it for them, and to whose order the loss was made payable, are sueing to recover upon the policy.

If Good Bros. & Co. had an insurable interest in the advances, even "an inchoate and contingent" one, there can be no doubt that it was covered by the policy "on account of whom it may concern."

It is essential to the case of the underwriters against Hooper, that they should show that Good Bros. & Co., to whom Hooper paid over the money as soon as collected, were not entitled to receive it. There

is not a particle of evidence in the record to support any such view. It is assumption merely which the plaintiff below, at the trial in the Circuit Court, did not attempt to maintain by proof.

There is nothing in the record to show what were the exact relations of Good Bros. & Co. to the ship, the master, or its owners. The plaintiffs below, in their declaration and prayers for instructions, appear to have assumed as a fact that they were the owners of the *Carolina*, but they offered no evidence to support the averment. The actual evidence in the case goes no further than to show that they were "friends" of the master, upon whom he drew in favor of Hooper for the amount of the necessary disbursements, to "protect" whom he directed Hooper to effect the insurance (including the amount of premium in his draft), who accepted and paid the draft, and for whom, after the loss, Hooper collected the money, and to whom he remitted it. In the absence of any testimony to prove the fact the Court will not violently presume, for the benefit of the underwriters who paid the loss, that Good Bros. & Co. had no insurable interest which entitled them to receive it. It is for the underwriters, the plaintiffs below, affirmatively to show it.

IV.

The first radical error in the instruction given to the jury by the Court below lies in the assumption, therefore, that there was no other interest covered or capable of being covered by the policy in this case except that of Hooper.

For whom a policy "on account of whom it may concern" is underwritten is a question of intention. The intention of the party who orders the policy determines who are the "concerned" under this general description. It is not even necessary that any specific individual should be intended. It is enough that it is intended for the indemnity of any party or parties who have an insurable interest. If the insurance is ordered, its application will be governed by the intention of the party who originally gives the order; if it is not so ordered, its application will be to the interest of the parties intended by the one effecting it, *whether himself or another*. A valid insurance may even, therefore, be effected between parties, both of whom are at the time ignorant of the specific persons to whose interest it is applicable. It will be applicable to the interest of any person subse-

quently ascertained to have such an interest (insurable) who adopts the insurance.

It is immaterial whether the person intended to be protected, therefore, authorizes the insurance beforehand or subsequently adopts it.

1 Phillips on Ins., (5th Ed.) secs. 383, 384, 385.
Buck vs. Chesapeake Ins. Co., 1 Peters, 157.
Ins. Co. vs. Chase, 5 Wall., 513–515.
Newsoms' admr. vs. Douglas, 7 Harr. & J., 451.
Md. Ins. Co. vs. Bathurst, 5 G. & J., 229.
Franklin F. Ins. Co. vs. Coates, &c., 14 Md., 285–299.
Routh vs. Thompson, 13 East, 285–7, (per Ellenborough L. C. J.)
Bridge vs. Niagara Ins. Co., 1 Hall, (N. Y.) 347.
Blanchard vs. Waite, 28 Maine, 59.
3 Kent Comm., 260.

So the interest covered may itself be "inchoate and contingent." According to the doctrine of Lords Mansfield and Kenyon, approved by a majority of the judges in Westminster Hall, in the leading case of *Lucena* vs. *Crauford*, (3 Bos. & Pul. 75,) the case of the Commissioners for the Dutch prizes, "an inchoate interest, although imperfect until a given contingency shall have taken place, is nevertheless insurable." According to Lord Eldon, quoted with approbation by Justice Story in 3 Sumner, 140, an insurable interest may be "either a right in the property, or *a right derivable out of some contract about the property*, which in either case may be lost upon some contingency affecting the possession or enjoyment of the property." The italics, which are Judge Story's own, would seem to afford an exact description of the interest of Good Bros. & Co. in the advances, covered by the master's draft upon them, accepted by them before the loss.

That they were the parties whose interest Hooper, who effected the insurance, and the master, who ordered it, *alike intended to insure and protect*, is proven by Hooper's own explicit and uncontradicted testimony. (Record, pp. 14–15.) He insured to protect Good Brothers & Co. The policy also incidentally protected him, but only as a sort of collateral security in his hands, in case of loss of the vessel and non-payment or non-acceptance of the master's draft by Good Brothers & Co.

Good Brothers & Co. ratified, in the fullest possible manner, the whole action of the master and of Hooper in drawing upon them for

the amount of the required "advances" and in insuring "said advances" for their protection. It is a case for the application of the maxim—*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*

See cases cited *supra*; also,
Lucena vs. Crauford, 3 Bos. & Pul., 75.
Hancox vs. Fishing Ins. Co., 3 Sumn., 140.
Lee vs. Mass. F. and M. Ins. Co., 6 Mass., 208.
3 Kent Comm., 262.

V.

The *second* fatal error in the Court's instruction to the jury was in assuming as a conclusion of law that Hooper's omission to communicate to the underwriters, "when he received payment of said insurance, and made and executed said assignment, that he had already received notice of the payment of the draft," (if the jury should find these facts), entitled the plaintiffs below to recover in this action. The "payment of said insurance" was received by Hooper on the 15th of January, 1873; the "assignment" referred to was made and executed by him on the 10th of February, 1873. The loss occured Nov. 14. Hooper was collecting the money, not for himself, but for Good Bros. & Co., for whom he effected the insurance and to whom he remitted the money. It was entirely immaterial to the underwriters to know whether the draft, the payment of which by Good Bros. & Co. only perfected their interest in the advances, while it relieved Hooper from further liability as an endorser—had been paid or not. That fact could not vary the risk or change the character of the loss.

Hooper was under no obligation, legal or moral, to disclose the fact that he was insuring for Good Bros. & Co. when he took out the policy "on account of whom it may concern." He was under no greater obligation to disclose the fact that he was receiving the money, which by the terms of the policy was payable to his order, for them. The nature of the interest insured was fully disclosed in the policy, viz: "Advances to cover disbursements and repairs," on a foreign ship. The itemized account of the disbursements furnished to their Baltimore agent, on Dec. 6th, and by him forwarded to his principals, with proofs of loss, gave the underwriters all the additional information they could require. If they needed more they could have asked for it. Not one item of the account was ever disputed. Included in the account upon its face is the item of the insurance premium, which they had received. Neither

when the account was furnished, nor when payment was made, nor at any time in the interval, did the underwriters or their agent inquire from Hooper for whom he made the disbursements, or whether he had been or expected to be reimbursed.

When Hooper received the money, on the 15th of January, and again, on the 10th of February, when he made and executed the assignment referred to in the Court's instruction to the jury, Hooper distinctly stated to the agent of the underwriters that *"he had no interest in the matter;"* that *"he had nothing to assign."* (Record, p. 15.) The underwriters did not ask—who had an interest?

It is difficult to understand what obligation rested on Hooper to volunteer to the underwriters the information that the master's draft had been paid—a fact which only relieved him personally from responsibility as an endorser, but did not lessen Good Brothers & Co.'s interest in the advances, or the responsibility of the underwriters to *them.* Hooper can not properly be accused of any want of frankness even in not mentioning a fact to which it is obvious that neither he nor the underwriters at that time attached the slightest consequence, and in regard to which the latter had not troubled themselves to make the slightest inquiry.

Silence is not concealment, unless disclosure be a duty. *Aliud est celare; aliud tacere; neque enim id est celare quicquid reticeas.*

Carter *vs.* Boehm, 3 Burr. 1905.
1 Smith's Leading Cases, 7th Am. Ed., 834, and notes to leading case.
2 Parsons on Contracts, 363, and cases cited.
Russell *vs.* Union Ins. Co., 1 Wash. C. C., 409.
Finney *vs.* Warren Ins. Co., 1 Metc., 166.
Higginson *vs.* Dall, 13 Mass., 96.
Wells *vs.* Phil. Ins. Co., 9 Serg. & Rawle, 103.

VI.

In any aspect of the case the Court erred in its instruction, in withholding from the jury the question of the *materiality* of Hooper's alleged omission to inform the defendants in error that the master's draft had been paid. *Materiality* in such cases is always a question for the jury, even when the fact, the improper concealment of which is alleged, is one which might and reasonably would have influenced

the action of the underwriters in entering into the contract, in accepting or rejecting the risk, or in fixing the amount of the premium.

The materiality of the alleged concealment is for the jury to find, not for the Court to assume.

Livingston *vs.* Md. Ins. Co., 6 Cranch, 274, 279.
Md. Ins. Co. *vs.* Ruden's Adm'r, 6 Cranch, 339, 340.
McLanahan *vs.* Universal Ins. Co., 1 Peters, 170, 187, 191.
Columbian Ins. Co. *vs.* Lawrence, 10 Peters, 516.
N. Y. Firemen's Ins. Co. *vs.* Walden, 12 Johns. 513.
Franklin Ins. Co. *vs.* Coates, 14 Md., 299.
Carter *vs.* Boehm, 3 Burr. 1905.
1 Smith's Leading Cases, 7th Amer. Ed., pp. 848, 850, notes to Carter *vs.* Boehm.
3 Kent's Comm., 284, 285.

VII.

Viewed as the present action must be, as an ordinary action to recover back money paid under an alleged mistake of facts, the plaintiff's right to recover must be determined by the equities of the case and the rules ordinarily applicable to such actions. They will not be permitted to recover if it would be manifestly inequitable to allow them to do so.

Moses *vs.* Macfarlane, 2 Burr, 109, (per Ld. Mansfield.)
2 Smith's Leading Cases, 7 Am. Ed., 402, (notes to Marriott *vs.* Hampton.

Here, the underwriters had the fullest opportunity of inquiry, if they had thought inquiry necessary, or had chosen to avail themselves of the means of information in their power. They might easily have known every fact at the time they paid the money which they profess to have learned since, and which they have made the basis of their present suit.

Their agent, Willson, resided in the same city with Hooper. They took more than the stipulated time, after proofs of loss, &c., to satisfy themselves before making payment. The policy "on account of whom it may concern," put them, if need be, on inquiry, to ascertain who were the parties "concerned." They were insuring advances for disbursements and repairs, on a foreign ship. They had notice in the particulars of the advances, of which a detailed statement was furnished them on the 6th of December, by Hooper, that

the insurance premium received by them from Hooper was by him charged to *somebody else*. At the time of making payment, and subsequently, they had Hooper's distinct disclaimer, on two several occasions, of any interest in the subject matter of the insurance, which could pass to them by his assignment or abandonment. He only signed as a matter of form, because it was "customary," and because urged to do so by their agent. (Record, p. 14.)

It was not until March, 1873, more than six weeks (*at least*) after payment, (January 15th,) and after Hooper had remitted the money, and no longer had it in possession, that their agent, Krebs, came from New York to Baltimore "to ascertain who owed Mr. Hooper for his advances." [Record, pages 13 and 14.] He saw Hooper, and the brief conversation which took place between them (see page 15 of record, and page 4 of this brief,) fairly epitomizes a great deal of the law, as well as the equity of the case. Upon this point compare the views of this Court in—

Insurance Co. vs. Chase, 5 Wall. 509.

VIII.

The underwriters here are sueing to recover back from Hooper money which they paid him, without inquiry, and which he, in perfect good faith, paid over to the persons for whom he had collected it, and who, he supposed, were entitled to receive it, long before suit brought, or any notice of any claim or demand on the part of the underwriters to have the money refunded.

There is no equity in the claim thus set up by the underwriters to have refunded to them money which they chose voluntarily, with the fullest opportunity for inquiry, to pay without inquiry to a person who received it innocently, and with no fraudulent intention at once paid it over to the parties to whom he believed it to belong.

All the evidence shows that the present suit of the underwriters is an *afterthought*. This is sufficiently indicated by Krebs' coming from New York to Baltimore in March, six weeks after payment of the loss, to find out "who owed Hooper for his advances," an inquiry which their Baltimore agent might have made for them at any time during the preceding four months.

The U. S. Lloyds have suffered no loss or wrong by any act or default of Hooper. They got the premium for insuring, and the vessel was lost by the perils insured against.

It is not even suggested that the action of the underwriters would have been different had they been informed of every particular relating to the subject at the time of making the insurance, or paying the loss. There is no suggestion on their part that if they had known all that they know now they would have declined the risk or charged a higher premium, or hesitated to pay the loss. They are in no worse case than they would have been if the fullest disclosure had been made to them of every circumstance, and the fact that no fuller disclosure was made is nobody's fault, unless it be their own or that of their agent, who had every opportunity to make inquiry, and who omitted or declined to do it.

It would be a great hardship to Hooper, under these circumstances, to be compelled to refund the money out of his own means. Personally he has derived no advantage whatever from the transaction. He has simply secured indemnity, as it was his duty, and as he was instructed to do, for the master's friends in England.

The underwriters should not be allowed now to take advantage of the changed state of accounts to place Hooper in a worse condition than he would have been if no payment had ever been made. It would be inequitable to allow them to recover from Hooper the money which he is no longer able to refund without incurring the very loss which *they* and not he contracted to bear, and for which *they* and not he received a consideration in the shape of the insurance premium, which premium the underwriters still retain, do not now offer, and never have offered to return. Apart from the injustice which would be done to Hooper, it is a clear case for the application to the defendant in error of the maxim—*Vigilantibus non dormientibus subveniunt leges.*

Elliott *vs.* Swartwout, 10 Peters, 153, 155.
Buller *vs.* Harrison, 2 Cowper, 565–8.
Carter vs. Boehm, 3 Burr. 1905.
Milnes *vs.* Duncan, 6 B. & C., 671.
Townsend *vs.* Crowdy, 8 C. B. N. S., 477.
Clarke *vs.* Dickson, El. Bl. & El., 148.
Cox *vs.* Masterson, 9 B. & C., 902.

I. NEVETT STEELE,
THOMAS W. HALL,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

No. 170, October Term, 1878.

JAMES HOOPER,
Plaintiff in Error,

vs.

DOUGLASS ROBINSON and JAMES F. COX,
Trading as Robinson & Cox.

In Error to the Circuit Court of the United States, for the Fourth Circuit, in and for the District of Maryland.

BRIEF OF DEFENDANTS IN ERROR.

STEWART BROWN,
ARTHUR GEO. BROWN,
For Defendants in Error.

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BRIEF OF DEFENDANTS IN ERROR.

I.

Statement of the Case.

The British steamer "Carolina" having been damaged by a collision in Chesapeake bay, put back to Baltimore for repairs, the cost of which, together with commissions and incidental expenses charged, amounted to $8,743.94. (Page 11.)

James Hooper, the plaintiff in error, trading under the firm name of J. Hooper & Co., was agent for the ship, which was consigned to him, (page 14,) and he paid the bills. To repay Hooper, Macgarr, the master of the "Carolina," gave him a bill of exchange for £1,611.18.7, drawn to the order of J. Hooper & Co. on Good Brothers & Co., of Hull, England, payable 30 days after sight, with directions to "charge the same to account for advances for repairs and disbursements of steamship Carolina

and her freight, to enable the ship to proceed on her voyage." (Page 14.) That bill, Hooper sold, having first endorsed it, to Alex. Brown & Sons, bankers, in Baltimore, who remitted it to their correspondents, Brown, Shipley & Co., in London. Said bill was accepted November 11th, 1872, and paid December 14th, 1872. (Page 14.)

On the day of the date of said bill of exchange, Hooper insured his said advances to the amount of $8000 in gold, under a policy of the U. S. Lloyds, which is an association of underwriters represented by Robinson & Cox, the defendants in error, as attorneys, F. W. Willson & Sons being their agents in Baltimore. (Page 9.)

The said policy of insurance is a "cargo" policy (page 5), intended for the insurance of "goods and merchandise," as its terms set forth, (see also testimony of the experts, Willson, page 10, and Higgins, page 13,) and upon it the risk insured for Hooper was endorsed. (Foot page 9.) That risk was assumed by the U. S. Lloyds on the application of Hooper, "who said that he had disbursed so much money for the ship" (top page 10), and it appears in the policy as an insurance of Hooper's, said "*advance* to cover disbursements and repairs." (Page 9.)

The amount of insurance endorsed on the policy was filled in as soon as Hooper declared the amount of his disbursements. (Page 10.)

On her homeward voyage the "Carolina" foundered at sea on November 14th, 1872, and was a total loss. On November 28th, information of the disaster reached this country (page 10), and on December 6th, 1872, Hooper presented to Willson, the Baltimore agent of defendants in error, the protest of the master of the "Carolina," with the statement of his (Hooper's) account. (Pages 10, 11.) The policy (foot page 5) provides, "in case of loss, such loss to be paid in thirty days *after proof of loss and proof of interest* in the said merchandise;" and "*the protest and account were presented by Hooper in response to a demand for proof of loss and interest under the policy.*" (Page 11.)

The proof of loss and interest so made by Hooper, in addition to the protest, consisted of the following account, (page 11):

British Steamer Carolina in account with J. Hooper & Co.

1872.

Oct. 26—To cash paid, as per disbursement account,	$8,298 99
" commission on advances, say $8,298.99 @ 5 per cent.....	414 95
" commission on value of cargo, discharged, say $3,000.00 @ 1 per cent.	30 00
	$8,743 94

E. E.

Baltimore, October 26th, 1872.

R. T. MACGARR,
J. HOOPER & CO.
per S. E. Hooper.

On January 4th, 1873, Hooper notified Willson that the claim would mature on the next day, being thirty days after proof. (Page 11.)

There was some delay in making payment, but Willson was finally instructed to draw on the defendants in error at 5 days' sight for the amount of the insurance, adding $12 for interest. (Foot page 11.)

Accordingly, such a draft was given to Hooper (top page 12), and he was asked to sign the usual assignment to the underwriters, which, however he objected to doing before the maturity and payment of the said draft, which was dated January 15th, 1873, and drawn at 5 days' sight. Hooper, therefore, gave a receipt (page 12) for the draft on defendants in error, "which, when paid, to be a settlement in full for claim for total loss of advances for disbursements and repairs per steamer "Carolina," &c.; "at which time we promise to assign all our right, title and interest in the above advances for disbursements and repairs to U. S. Lloyds," signed J. Hooper & Co.

Before receiving that draft, Hooper admits (page 15) that he knew that Macgarr's draft (page 14), which had been given to him to repay those very advances, for the total loss of which he was then claiming indemnity from the underwriters, had been paid; but that fact he did not communicate to the underwriters (pages 13, 14, 15). On the contrary, he studiously concealed it from them, and continued to demand and received from them in-

demnity for the pretended loss of his (Hooper's) "advances" set forth in his proof of loss and interest under the policy. (Page 11.)

On February 10th, 1873, Hooper still concealing the fact that he had been paid, executed to the underwriters the formal assignment (page 12) called for by his receipt. (Page 12.)

To this assignment and its formal and solemn representations as to the advances, and the affidavit which accompanied it (page 13), the attention of the Court is specially requested. In March following, the underwriters first learned, indirectly, pages 13, 14,) that Hooper had in fact been paid his advances at the time he demanded and received indemnity for his pretended loss of them, and after fruitless application to him they brought suit against him (page 1) in the Circuit Court of the United States for the fourth Circuit in and for the Maryland District, to recover the $8000 which, by Hooper's misrepresentations and concealments, they had been induced to pay to him.

The Court rejected the prayers offered on both sides, and granted an instruction of its own, and the jury gave a verdict for the full amount claimed against Hooper; and having reserved one exception, he sued out a writ of error. (Page 18)

II.

The defendants in error contend:—

1. The instruction granted by the Court below (page 17,) was correct.

Under it the following questions were left to the jury, viz:

a. If the jury shall find from the evidence in this case, that when the defendant (plaintiff in error) made his claim for indemnity on the United States Lloyds, under the policy offered in evidence, he produced the account, and subsequently made the receipt and assignment offered in evidence.

These are undisputed facts. The policy required proof of loss and interest, (page 5), and to prove his loss and interest Hooper produced his account, (pages 11, 15); and he subsequently made the receipt and assignment. (Page 12.)

b. If the jury shall find from the evidence that when Hooper received payment of said insurance, and made and executed said

assignment, he had already received notice of the payment of the draft given to him to cover said advances.

These are also undisputed facts.

The draft drawn by Macgarr, the master of the "Carolina," was paid December 14th, 1872. (Page 14.)

Hooper actually received payment of said insurance January 21th, 1873, (page 15); his receipt was given for the draft on the defendants in error January 15th, 1873; and his assignment to the underwriters was executed February 10th, 1873, (page 12); and Hooper himself testified (page 15) that he "*knew before January 15th, 1873, that the master's draft had been paid.*"

c. If the jury shall find from the evidence that Hooper did not communicate to the underwriters the said fact, (viz: that he had received notice of the payment of the draft given to him to cover said advances.)

This is also an undisputed fact. Hooper himself testified (page 15), "witness filed with Wilson his statement of loss, and the protest. *Witness did not communicate to Wilson the fact that he had been paid.*"

It, therefore, appears that there was no assumption of any fact in the Court's instruction, and that the uncontradicted evi dence in the cause fully sustains it.

If then there was any error in that instruction, it must be because some pertinent question of fact in evidence was omitted; or because the Court was mistaken as to the bearing or the legal relevancy of some one or more of the questions of fact which were submitted to the jury.

2. Hooper having advanced, under the circumstances set forth in the record, $8743.94 for the benefit of the "Carolina," he had a lien to that extent on that vessel, (the Emily Souder, 17 Wall. 666,) and to the extent of that lien, and until his advances were repaid, he had an insurable interest.

Carpenter vs. Prov. Ins. Co., 16 Pet. 495, 501, 2, 5, 511, 512.

Angell on Insurance, section 59.

Home Ins. Co. v. Balt. w. & C. 3 Otto 541, 2
Geo. C. v. Barnes 20 Wall. 163, 4

His said advances to the amount of $8000 were insured by Hooper under the policy in the record. (Page 9.) When

Hooper applied for the policy, his distinct representation was that "*he* had disbursed so much money for the ship," &c. (Page 10; see also page 12.)

The policy (foot page 5) expressly provided, "in case of loss, *such loss to be paid in thirty days after proof of loss and proof of interest*," &c. When he heard of the loss of the "Carolina," Hooper made his claim for indemnity, and was met by a "*demand for proof of loss and interest under the policy.*" (Foot page 11.)

In response thereto, Hooper presented his account (page 11), and followed it up by his receipt, assignment and affidavit (pages 12, 13), as already shown.

By said papers, and each and all of them, Hooper made, and as often as he had opportunity, reiterated the statement, that his "advances," which he had insured, were still due and unpaid to him; and he also concealed from the underwriters the fact that he had been fully paid, that the subject matter of the insurance no longer existed, and that there had ceased to be any "advances"; that he had met with no loss, and was entitled therefore to no indemnity. His duty was not only not to conceal, but frankly to disclose, with entire good faith, all the facts.

"The insurer is undoubtedly entitled to all the evidence or documents which the insured has."

2 Parson's Marine Ins., p 474.

Hidden vs. Slater Ins. Co., 2 Cliff., 269.

Ins Co v Newton 22 Wall. foot p. 35, 36

"It must be understood that in this matter of preliminary proof, the essential requisite is entire good faith on the part of the insured."

Idem, p. 478, and authorities there cited.

Allegre vs. Maryland Ins. Co., 6 H. & J., 408, 412.

The underwriters were entitled to the best evidence that Hooper possessed, "so that they might be able to form some estimate of their rights and duties before they were obliged to pay."

Columbia Ins. Co. vs. Lawrence, 10 Pet. 507, 515, 516.
Lawrence vs. Ocean Ins. Co., 11 Johns, 259, 260.
1 Parsons Mar. Ins., 468, 469.
Smith vs. Columbia Ins. Co., 17 Penn. State, 253, 260, 261.

Having been, by Hooper's concealment and deceit, induced to pay him $8000, the underwriters were entitled, after discovery of the real facts, to recover that sum in this action.

2 Parsons Mar. Ins. 489, 490, and the authorities cited and fully referred to in the notes.

3. By the abandonment (page 12) accepted by the underwriters they were put completely in the place of the assured, and they were entitled to and had the right to understand and assume that they thereby acquired and were subrogated to all the rights which Hooper possessed at the time of the loss, including his right to demand re-payment of the "advances" which had been made by him.

Chesapeake Ins. Co. vs. Stark, 6 Cr. 268, 272.
Hart vs. Western R. R., 13 Met. 99.
2 Parson's Mar. Ins., 492, 494.
1 Parson's Mar. Ins., 229.
2 Phillips' Ins., secs. 1511, 2123, 2162.
2 Am. Leading Cases, 835.
Hall vs. Railroad Co., 13 Wall. 370.
The Falcon, 19 Wall. 80.
Atlantic Ins. Co. vs. Storrow, 5 Paige Ch. 285, 294.
Ætna Ins. Co. vs. Tyler, 16 Wend. 385, 397, 399.

4. The phrase, "on account of whom it may concern," protects only persons who had an insurable interest at the date of the policy, and at the time of loss.

1 Parsons' Mar. Ins. 46, and the authorities cited in note 1, page 46.

1 Phillip's Ins., sec. 387.

Rider vs. Ocean Ins. Co., 20. Pick. 259, 263–265.

Garrell vs. Hanna, 5 H. & J., 412.

5. Therefore, Good Brothers & Co., the drawees of Macgarr's bill of exchange, (page 14), had no insurable interest, and no "concern" with the policy.

When the policy was taken out, there is not the slightest evidence that they had authorized him to draw on them, or knew that he was going to do so, or were under any obligation to accept or pay the bill; and when the loss occurred they had not paid the bill of exchange which had been drawn. Good Brothers & Co. had, therefore, no insurable interest either at the date of the policy or the loss; and the Court properly ignored Hooper's testimony (page 14,) as to Macgarr's orders to "protect his friends, Good Brothers & Co.," and rejected the defendant's prayer, (page 17,) which chiefly relied upon that testimony.

6. Defendant's prayer was also fatally defective by reason of the fact that it assumed that Hooper "*by direction of Good Brothers & Co.*," presented proofs of the loss, because there is no evidence of any such direction.

7. There is no evidence that either Macgarr or Hooper was agent of Good Brothers & Co., or authorized to insure for them. Macgarr was their "friend," (page 14,) who, for some reason best known to himself, drew on them a bill of exchange in Hooper's favor.

Seamans vs. Loring, 1 Mason, 136.

8. That bill, Hooper took, holding on to his lien. (Page 15.)

As regards Hooper, however, and his lien and "advances," that bill was conditional payment at the moment it was given, and when paid, on December 14th, 1872, it became absolute payment, and destroyed the lien, and the advances which had been the subject matter of insurance.

The Emily Souder, 17 Wall., 670.

9. Indeed, Hooper's advances were, in fact, repaid to him in cash on the day he sold Macgarr's bill to Alexander Brown & Sons, (page 14,) and thereafter his only risk was a possible liability as endorser of the bill. (Page 14.) The endorsement and sale of that bill of exchange by Hooper to Alexander Brown & Sons, was equivalent to an assignment to them of Hooper's claim to be repaid his advances, and as such, it was a material fact which good faith required him to disclose when he applied to the underwriters to indemnify him for his pretended loss, and offered his proofs, and gave the receipt and assignment. (See authorities cited above, under points 2 and 3, and 1 Parson's Mar. Ins. 243, and note 4.

10. The contract of the underwriters was to pay on proof of interest and proof of loss, as already shown. Hooper was, therefore, bound to show for whom and in what right he was collecting the insurance money. This, having exclusive possession of the facts, he undertook and pretended to do, by proving, as if for himself, a loss which he had not suffered, under an interest which had long since ceased to exist.

The underwriters have no concern with the disposition that Hooper chose to make of the money which he induced them to pay under this mistake of fact on their part, which was caused by Hooper's own concealments and false representations; and they contend that the instruction of the learned Court below was correct, and should be sustained on this ground, even considered apart from the other grounds relied upon in this brief.

STEWART BROWN,
ARTHUR GEO. BROWN,
For Defendants in Error.

In the Supreme Court of the United States.

No. 170, October Term, 1878.

JAMES HOOPER,
Plaintiff in Error,

vs.

DOUGLASS ROBINSON and JAMES F. COX,
Trading as Robinson & Cox.

In Error to the Circuit Court of the United States, for the Fourth Circuit, in and for the District of Maryland.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

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SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

The defendants in error ask leave to make the following points and suggestions in reply to the brief of the plaintiff in error, which has been filed since the brief of the defendants in error was prepared and filed in this Court.

I.

As to the technical point No. VI. of plaintiff in error, viz: that the Court assumed *a fact* in the instruction.

Note. The cases relied on are discussing the materiality of a misrepresentation in reference to the *risk assumed.*

This is held to be a fact for the jury, the question being, under all the circumstances, whether or not the risk would have been taken, if the disclosure had been made.

But the concealment here complained of, viz: that the advances had been repaid to Hooper, is not of this class.

The distinction is found in the character of the action, and the evidence necessary to sustain it.

This action is for money paid under a mistake of fact.

This mistake, (which was caused by Hooper's sworn statement, to the effect that the money *was still due to him*,) was in the understanding on the part of the defendants in error, that the money had not been repaid to him.

It was this fact, viz: that Hooper had been fully paid, that discharged the insurer, and rendered the money not due.

Yet, if the fact had been known, this would have made the payment voluntary, and have prevented recovery.

It is only therefore in view of this defence, viz: voluntary payment, that the jury were required to find the fact of concealment.

It was, however, a question *of law*, for the Court alone, to determine, what facts, if found, did discharge the insurer.

The previous repayment of the advances, effected such discharge. But it was also necessary for the jury to find that the underwriters did not know they were thus discharged, and then voluntarily pay.

The facts necessary to establish the mistake were all that the jury could pass on.

To have submitted to the jury the question as to "whether or not if the plaintiffs had known of this repayment they would still have paid the insurance," which is the argument of the plaintiff in error, would have been inviting the jury to *vague and uncertain speculation*, without any guide.

The real question being—1st. Had the money been repaid, for if so the underwriters' liability had ceased.

2d. Did the underwriters know of this repayment, for if so then their payment was *voluntary*.

No *special* exception was taken in the Court below to this alleged assumption of fact, as would have been necessary in our State Courts, under Act of 1862, chapter 154.

1st Supplement to Code, page 15.
Constitution of 1867, Art. 4, Sec. 18.
29 Md. p. 2, Rule 4.

And it is suggested that under the Revised Statutes of the United States, section 914, adopting the forms and practice of the State Courts, a special exception should have been thus made, to enable the plaintiff in error to urge the objection in this Court.

II.

As to the points VII and VIII, of plaintiff in error, wherein the defence of laches is set up, and the ground taken that no recovery can be had unless Hooper could be put back in the same situation he occupied before the payment, and as to the cases cited by the plaintiff in error, we remark, that while the doctrine might apply to a case where the payment, to use the language of Lord Mansfield in Buller vs. Harrison, 2d Cowper, 565 "had been expressly made to an agent," that is as *such* agent, the doctrine has no application to this case, because—

1st. Hooper held himself out, in the proof of loss and interest, and in his *receipt*, as *principal*.

2d. If he had disclosed any agency, or asserted that Goode Brothers & Co. were "concerned," then it would have followed that either—

(*a.*) No payment would have been made or have been demanded, because they had no insurable interest at the time the risk was taken;

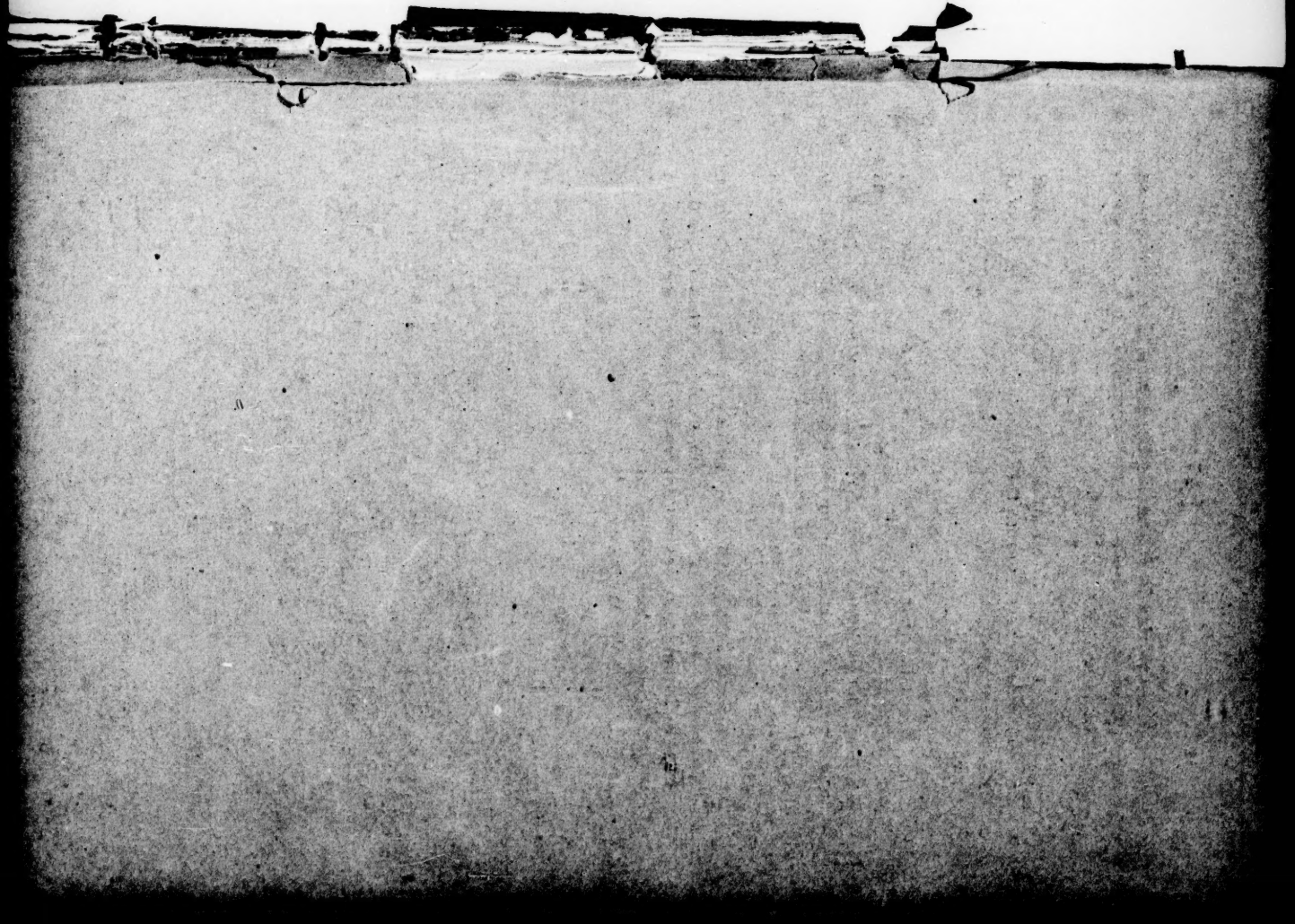
(*b.*) Or the underwriters would have had a right to get from Goode Brothers & Co. all *their* interest and claim in the advances.

3d. Any delay in demanding the return of the money was due to the fact that Hooper was supposed, on his own statement, to be the principal.

4th. It cannot be contended that all inquiry was *waived* by the underwriters, because they expressly demanded *proof* of loss and interest, and were furnished with such sworn statement.

Note also that in the case of Townsend vs. Crowdy, 8th C. B. N. S., 477, the very point is made by Baron Williams during the argument, page 489, who adverts to the fact that the notes in Smith's Leading Cases to the case of Marriott vs. Hampton, where the conclusion from all the authorities is attempted to be stated—had introduced again the doctrine of laches.

But the said point is abandoned by that very Judge in his opinion, (page 492,) and by the whole Court, and the doctrine of laches, to the extent contended for by the plaintiff in error, is considered to be overruled on the authority of

Kelly vs. Solari, 9 M. & W. 54.
Bell vs. Gardiner, 4 M. & G. 11, (43d E. C. L. R.)
Dailes vs. Lloyd, 12 Q. B. 531, (Vol. 64 E. C. L. R.)

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